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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 21 2005
EAC 04 025 52198

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is the founder, chairman of the board and president of research and development at Astralis Ltd., described by a company official as "a start-up biotechnology company formed to engage in the research and development of treatments for immune system disorders and skin diseases." The record identifies a vaccine, Psoraxine, which (according to the petitioner) is effective against the skin disorder psoriasis and the tropical disease Leishmaniasis. Psoraxine was in Phase I clinical trials at the time of filing, and it appears to be the only product that Astralis currently makes (the record identifies no other such product). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

On appeal from the director's decision, counsel protests that the director failed to issue a request for evidence, which is required by 8 C.F.R. § 103.2(b)(8) in instances where there is no disqualifying evidence and the evidence submitted does not fully establish eligibility. We conclude from our review of the record that the issuance of such a notice is very much in order here.

We note that 8 C.F.R. § 204.5(m)(4)(ii) specifically requires the submission of a completed Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The petitioner's initial submission lacked this document, and the director has not yet noted this omission or given the petitioner the opportunity to submit the document.

Counsel states that the petitioner's articles have been cited 475 times up to 1995, but the record provides no corroborating documentation or identified source for this information. It would clearly be cumbersome to require copies of hundreds of citing articles; printouts from a citation index, identifying the citing articles and their authors, would suffice in this regard.

Counsel further states: "From 1995 on his work has been cited many, many times so it has not been included and will be provided from the Citations Index if required by the Service Center." The wording of this latter assertion indicates that the petitioner's post-1995 citations have been omitted because there are so many of them. Counsel has individually listed almost all of the claimed citations from before 1995; their great number has obviously not prevented their being listed. Thus, counsel has effectively implied the existence of a very substantial amount of post-1995 citations (because the petitioner's several hundred pre-1995 citations are not too numerous to list, but his later citations are too numerous). In this regard, we note that, of the 455 citations listed up to 1995, only 47 of those citations are from 1990 or later. Thus, even if the list of citations were substantiated with documentation, the list indicates on its face that the petitioner's citation rate has declined in the years leading up to 1995.

The petitioner's overall citation history, if corroborated, would be very impressive indeed, but this history carries little weight without evidence that the petitioner continues to perform new, original research for publication (as opposed to focusing his efforts on the commercialization of a single product that he has already invented and patented). Whatever the petitioner's track record in academia as a university professor, the record does not establish that the petitioner has enjoyed comparable success or had similar impact as a pharmaceutical executive, and it is as a pharmaceutical executive that the petitioner purports to warrant a national interest waiver.

Counsel argues that labor certification is not a realistic option for executives of companies that they themselves have founded. We note, nevertheless, that this is not, by itself, a strong ground for a waiver; otherwise, any alien could circumvent the labor certification process simply by starting a business or forming a corporation in the United States. We do not take the position that Congress intended to create a blanket waiver for aliens who, while in nonimmigrant status, establish businesses in the United States. Such aliens must still establish that their continued presence in the United States is in the national interest.

The petitioner has submitted numerous witness letters in support of his petition, but examination of these letters reveals issues that warrant further scrutiny. Six of the letters, said to be signed by high-ranking medical researchers in Venezuela, are virtually identical, even containing the same grammatical errors (such as "I may assure on the great benefits which will result for the mankind when the vaccine had pass all the proofs"). Additional letters from other witnesses appear to be based on a second template, as they, too, share several commonly-worded passages. The witnesses using the second template state that they "will follow the guidelines provided in the letter of instruction."

Of greater concern than the obvious common authorship of the letters is the apparent lack of independent reaction to the petitioner's current work. The petitioner's witnesses include his patent attorney, a consultant, and others with an apparent vested interest in the petitioner's company. One individual, Gaston Liebhaber, identifies himself as president of Sankyo Pharma Venezuela, but does not disclose that he is a member of Astralis' executive board (as other documents in the record show).

From the materials submitted, Astralis appears to exist for the sole purpose of developing and marketing Psoraxine. If this is not accurate, the petitioner should provide persuasive evidence to the contrary. Also very useful would be information about the progress of Psoraxine's clinical trials, and independent evaluations to demonstrate, empirically, that Psoraxine represents a substantial improvement over existing methods already used to treat psoriasis.

The record, as it now stands, by no means rules out a finding of eligibility, and isolated elements (such as the petitioner's impressive credentials in his native Venezuela) tend to support such a finding. Nevertheless, significant questions remain (as outlined above), and the petitioner should have a chance to address these issues before a decision is rendered.

We agree with counsel that the director should have issued a request for evidence, and we have described, above, several areas that merit serious attention in such a request for evidence. Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.